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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1246

JAMES J. OESTEREICH, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 11, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Regulations of the Selective Service System authorize local boards to reclassify as a delinquent any registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)), and require that such a delinquent be given the highest priority for induction into the Armed Forces (32 C.F.R. 1631.7(a)(1)). In the instant case, petitioner, on November 7, 1967, was placed in a delinquency status by his local Selective Service board on two grounds: (1) "failure to have in his possession a duly authorized Registration Certificate (SSS Form 2)," and (2) "failure to provide the local board [with notice] of his current status" (R. 3). On the same day, petitioner, who previously

had a IV–D classification as a theological student, was reclassified as I–A. After an unsuccessful administrative appeal, he was ordered to report for induction.

Subsequently, this action, seeking to restrain petitioner's induction, was filed in the District Court for the District of Wyoming (where petitioner's local board is located). The district court dismissed the complaint, citing the prohibition of pre-induction judicial review contained in Public Law 90–40 (50 U.S.C. App. 460(b)(3), as amended, 81 Stat. 100), and failure to comply with the $10,000 jurisdictional amount required by 28 U.S.C. 1331 (Pet. App. 3a–8a). The court of appeals affirmed in a brief opinion (Pet. App. 1a–2a), and denied an application for a stay pending review in this Court. On March 5, 1968, Mr. Justice White granted a stay of the judgment below, conditioned on the filing of a petition for certiorari by March 19, 1968.

I

This portion of the government's memorandum restates the views which were presented to the courts below and is responsive to the contentions advanced by petitioner. The case involves, however, a serious additional question, which is discussed in Part II, *infra*.

1. Both courts below held that the present action is barred by a provision of Public Law 90–40, which prohibits judicial review of any Selective Service classification prior to induction. The relevant portion of the statute (81 Stat. 100, amending 50 U.S.C. App. 460(b)(3)) reads as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Under this statute, a registrant must either refuse induction and risk criminal prosecution, or submit to induction and seek a writ of habeas corpus, in order to obtain judicial review.[1] While this scheme undeni-

[1] Public Law 90–40 does not explicitly preserve the habeas corpus remedy. However, the law prior to 1967 (when P.L. 90–40 was adopted) clearly permitted habeas corpus as a means of testing the validity of an induction order. *Witmer* v. *United States*, 348 U.S. 375, 377; *United States ex rel. Reel* v. *Badt*, 152 F. 2d 627 (C.A. 2); *United States ex rel. Samuels* v. *Pearson*, 151 F. 2d 801 (C.A. 3). The legislative history of P.L. 90–40 makes it plain that Congress intended to preserve the generally prevailing law with respect to judicial review of Selective Service classifications (H. Rep. No. 267, 90th Cong., 1st Sess., pp. 30–31). In addition, the statute provides for review after the registrant has responded "affirmatively" to the induction order; such review could only be by habeas corpus, since in these circumstances there would be no basis for a criminal prosecution. There would be room for doubt as to the constitutional validity of a reading of the statute which would abolish habeas corpus as a means of contesting an induction order. U.S. Constitution, Art. I. Sec. 9.

ably requires a registrant to incur a serious risk in order to obtain review of his draft classification, Congress has determined that the need for postponing judicial review in such situations outweighs any countervailing considerations.[2] Public Law 90–40 was designed "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell); see *Falbo* v. *United States*, 320 U.S. 549, 551–554). Indeed, if pre-induction review were generally available, many men could be expected to bring suit in the hope of avoiding, or at least postponing, military service. Postponement of judicial review serves the national interest in preventing delays in the induction process, and the rights of the individual can be vindicated through the availability of post-induction review. Congress has thus struck a balance consistent with the Constitution.[3]

Petitioner argues that Public Law 90–40 cannot be validly applied to cases in which First Amendment

[2] Habeas corpus petitions must, of course, be accorded precedence on a court's calendar (see 28 U.S.C. 2243), thus keeping the registrant's time in service at a minimum if the court should rule the induction illegal. Until such a final ruling, there would be a strong argument against staying inductions, even absent the explicit provisions of P.L. 90–40. Since the draft board's quota must in any event be filled, a preliminary injunction against the induction of a registrant who has filed suit would have the consequence of causing the induction of some other individual to take his place.

[3] A similar problem was involved during World War II under the Emergency Price Control Act, in which Congress prohibited temporary injunctions against price control regulations. This provision was sustained in *Yakus* v. *United States*, 321 U.S. 414, 441.

issues are raised, since the burdens involved in obtaining judicial review within the confines of the statute would result in a "chilling effect" on First Amendment rights. *Dombrowski v. Pfister*, 380 U.S. 479, 487–489. However, the conditions which led this Court in *Dombrowski* to hold that an injunctive suit was available there to vindicate First Amendment rights are not present here. In *Dombrowski*, a crucial circumstance was that the plaintiffs were not assured a "prompt judicial resolution of First Amendment claims" in connection with the normal means of judicial review (380 U.S. at 489). That is not the situation here. If review is by habeas corpus, the case must receive precedence on the district court's calendar (see note 2, *supra*). And any criminal prosecution resulting from a refusal to submit to induction is required by the statute to be accorded precedence over other cases (see 50 U.S.C. App. 462(a), 462(c), as added by P.L. 40, 81 Stat. 100). Moreover, reclassification here was predicated on the violation of defined duties imposed upon Selective Service registrants: the duty to carry the registration certificate at all times (32 C.F.R. 1617.1), and the duty to keep the local board informed of the registrant's status (32 C.F.R. 1641.7). Resolution of the First Amendment questions involved in this case, unlike those in *Dombrowski*, would not require a "series of * * * criminal prosecutions" (380 U.S. at 489).

2. Petitioner's principal First Amendment claim is that the delinquency regulations are impermissibly broad and, as drafted, readily lend themselves to a denial of First Amendment rights. These regulations authorize reclassification of a registrant who "has

failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)). This language simply incorporates the provisions of the Selective Service law and regulations imposing certain duties on registrants, and petitioner has not shown that any of those provisions are impermissibly vague. Certainly the duties involved in this case—the duty to carry a registration certificate at all times (32 C.F.R. 1617.1) and the duty to keep the local board informed of the registrant's status (32 C.F.R. 1641.7)—are narrowly defined and are not subject to a charge of vagueness. The regulations imposing these duties were the basis for the local board's action here. Thus, the fact that broader statements appear in General Hershey's letter of October 26, 1967 (Pet. App. 9a–11a) is not relevant to this case.

Petitioner also argues that the requirement in the regulations that registrants keep their registration certificates in their possession at all times (32 C.F.R. 1617.1) violates the First Amendment, at least as applied to registrants whose surrender of their certificates is intended as a form of political protest or "symbolic speech." However, the "possession" requirement has been upheld against First Amendment challenge by every court of appeals which, expressly or impliedly, has considered the question. See *United States* v. *Miller*, 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911; *United States* v. *Kime*, 188 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823; *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), pending on petition for certiorari, No. 765, this Term; see also *O'Brien* v. *United States*, 376 F. 2d 538 (C.A. 1),

certiorari granted, 389 U.S. 814. Congress clearly has the power to raise armies (U.S. Const. Art. I, Sec. 8), and may do so through a draft system that requires registration of all men over 18. Perhaps such a system could be operated without requiring registrants to carry their registration certificates. But the conclusion that a nationwide registration system in a country with a large transient population would work more effectively with such a requirement is hardly unreasonable. See *United States* v. *Miller, supra*, 367 F. 2d at 80–81.

3. Petitioner's remaining contentions do not involve the First Amendment and thus, even under petitioner's view of Public Law 90–40, would not appear to be a proper subject for pre-induction judicial review.

a. Petitioner attacks his reclassification as a delinquent on the ground that it constitutes the imposition of punishment without the procedural protections afforded by the Bill of Rights in connection with criminal prosecutions. Induction into the Armed Forces is not, however, a penal sanction. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–169. While military service undoubtedly involves hardship and restraint, it also represents a duty commonly owed by all citizens. The delinquency regulations are designed as an administrative means of insuring that the registrant complies with the duties he personally owes to his local board and the Selective Service System—and to the public generally. Since they seek to render self-defeating any attempt by the registrant to cut himself off from contact with the Selective Service

System, these regulations are basically remedial rather than punitive in nature. Indeed, the primary purpose of delinquency reclassification is to bring the registrant back into compliance with his duties. Until the moment of induction, the registrant has the opportunity to have his delinquency status changed if he corrects his default, and a delinquent registrant who has been reclassified I-A may be restored to his prior classification without the restrictions against reopening classifications which would otherwise be applicable (see 32 C.F.R. 1642.4(c), 1642.14). In essence, the delinquency regulations are analogous to the civil contempt sanction since they are a means whereby the Selective Service System may facilitate its operation by compelling registrants to perform their duties under the pertinent laws and regulations.

Petitioner apparently agrees with this characterization of the delinquency regulations (see Pet. 23-24). He argues, however, that those regulations should apply only to duties pertaining to the classification and induction process, and that possession of a registration certificate is not pertinent to that process. However, registration is a necessary, preliminary step to classification and induction. The requirement of possession of a registration certificate is calculated to make the entire system operate more effectively (see *supra*, pp. 6-7).

We recognize that whether an administrative reclassification amounts to the imposition of a penalty might in some circumstances present a substantial question. Thus, in *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), on which

petitioner relies (Pet. 12–14, 21), the court of appeals concluded that "it is not the function of local boards in the Selective Service System to punish * * * registrants by reclassifying them 1-A because they protested * * * the Government's involvement in Vietnam" (*Wolff, supra,* at 822). But the situation here differs from that involved in *Wolff,* where the registrants who were reclassified had engaged in a demonstration at the local draft board offices in protest against American involvement in Vietnam (see *id.* at 820). In the instant case, unlike the situation in *Wolff,* petitioner was reclassified because of his failure to comply with pertinent Selective Service regulations and not because of any protest activity as such.

By their terms, the delinquency regulations are applicable only where an individual "has failed to perform any duty or duties required of him" under the Selective Service statutes and regulations (32 C.F.R. 1642.4(a)). As the court in *Wolff* noted, while it was alleged and "could * * * be claimed" that the conduct engaged in constituted action hindering or interfering with the administration of the Selective Service System (372 F. 2d at 821), "no regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action" (*ibid.*). The instant petitioner was in violation of a specific, continuing duty imposed upon him by the regulations; the duty involved in *Wolff,* if any, was neither specific nor continuing, nor affirmative in nature. Thus, unlike the registrants in *Wolff,* petitioner could have corrected his violation at any time (see *supra,* p. 8).

b. Petitioner also contends that his reclassification violated the procedure required by the regulations (32 C.F.R. 1642.4, 1642.10), on the ground that there was no lapse of time between the Notice of Delinquency and the Notice of Classification. The purpose of such a time lapse would have been to permit petitioner to correct his status. However, petitioner had ample opportunity to do so—over six weeks elapsed between the date on which his Notice of Classification was mailed (November 7, 1967) and the date on which his induction order was mailed (December 27, 1967). During this period, the local board had the authority to reopen his classification at any time without regard to restrictions otherwise applicable, and petitioner had the right to a personal appearance before his local board and an administrative appeal (32 C.F.R. 1642.4 (c), 1642.14). Petitioner did not correct his delinquency during this period, and there is no reason to believe that an additional few days or weeks between the Notice of Delinquency and the Notice of Classification would have changed the situation. There was thus no prejudice. See *Wills* v. *United States*, *supra*.

4. In reclassifying petitioner as a delinquent, his local board cited not only his failure to keep his registration certificate in his possession, but also his "failure to provide the local board [with notice] of his current status" (R. 3). Petitioner's complaint made no allegations with reference to this ground for the local board's decision, although in order to overturn the administrative action, he is under the

burden of showing that all grounds of decision are invalid. None of petitioner's constitutional arguments is applicable to this ground, and the delinquency regulations—even under petitioner's analysis (Pet. 20–24)—authorize a delinquency reclassification on this ground.

II

Quite apart from the validity of the arguments made above, there is a further problem in this case. Although the issue is not advanced directly by counsel for petitioner, it is apparent on the face of the record. It does not appear to be a matter which can be appropriately overlooked.

In this case, petitioner's exemption from military service and training is one which has been granted to him by Act of Congress. Section 456(g) specifically provides that—

> students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools * * * shall be exempt from training and service (but not from registration) under this title.

Petitioner is a full-time student in good standing at the Andover Newton Theological School, which is a "recognized theological or divinity school."[4] Thus, he is exempt by the terms of the statute from "training and service" under the Selective Service Act. What Selective Service System Local Board No. 11 has done

[4] The Solicitor General has confirmed these facts.

here is to terminate, by administrative action, the exemption which has been granted by statute. If that action was contrary to the express terms of the Act of Congress granting the exemption, this is obviously relevant in considering the application of the procedural provision on which the government has relied in this case.

This issue does not necessarily involve the constitutional validity of the provision of Public Law 90–40 relied on by the courts below. That statute forbids "judicial review * * * of the classification or processing of any registrant by local boards," except in defense to a criminal prosecution. It is possible to construe this language as applicable to the generality of situations where the local board has applied its judgment, but to exclude purported action of a board which is in fact contrary to an exemption which has been expressly granted by statute. Such a construction is not only possible here, but it is desirable in order to avoid conflict with the congressional determination to grant exemption to ministers and ministerial students. In this situation it may be observed that there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is subject to challenge only on the ground that the board has misapplied or abused its authority in making its judgment. Cf. *Harmon* v. *Brucker*, 355 U.S. 579, 581–582; *Leedom* v. *Kyne*, 358 U.S. 184, 188.

Of course, the question of the board's power to disregard the statute could be raised in defense to a criminal prosecution, or in a habeas corpus proceeding

after induction. This, however, is a very heavy burden to put on the citizen if the board has in fact acted contrary to the terms of the statue—which is the situation here, as we read the Act of Congress relating to the exemption of divinity students, and the other statutes involved. This question is central to this case, quite apart from other questions which have been raised.

The Solicitor General submits these views for the consideration of the Court. It is his position that, in the light of the facts in this particular case, and in the interest of justice, the judgment below should be reversed, and the cause remanded with directions to hold a hearing as to the presence of the jurisdictional amount required by 28 U.S.C. 1331[5] and if, jurisdiction under that section is found, to enter a decree in favor of petitioner on the basis of his acknowledged status as an exempt ministerial student.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

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[5] Here the trial court held that there was no federal jurisdiction because the jurisdictional amount required by 28 U.S.C. 1331 was not established (see *supra*, p. 2). See *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, 826 (C.A. 2); *Giancana* v. *Johnson*, 335 F. 2d 366 (C.A. 7), certiorari denied, 379 U.S. 1001. However, the complaint alleged that the amount in controversy exceeds $10,000 and, while no supporting facts are alleged, the remainder of the complaint does not negate the possibility that $10,000 may be involved. Since the defendants did not contest the allegation of jurisdictional amount, it would appear that the trial court should not have dismissed on this basis without first giving petitioner an opportunity to make more specific allegations and offer proof on this score.

U.S. GOVERNMENT PRINTING OFFICE: 1968